(3)

No. 90-350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IN RE GERALD J. SANDERFOOT, DEBTOR.

JEANNE FARREY, f/k/a JEANNE SANDERFOOT,
Petitioner,

v.

GERALD J. SANDERFOOT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Does the federal bankruptcy code give an individual, awarded his spouse's interest in the family's exempt homestead in a contested divorce case, the absolute right to avoid the homestead lien simultaneously awarded the debtor's spouse in the same divorce judgment?

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BRIEF FOR THE PETITIONER

CITATION OF OPINIONS AND JUDGMENTS BELOW

The 2-1 opinion of the U.S. Court of Appeals for the Seventh Circuit is reported at 899 F.2d 598. It is reprinted in the appendix to the petition for a writ of certiorari, Appendix ("App."), pp. 1a-21a, submitted in lieu of a Joint Appendix pursuant to Rule 26.7 and this Court's January 7, 1991 order.

The decision of the U.S. District Court for the Eastern District of Wisconsin (Gordon, J.), which the Court of Appeals affirmed, is reported at 92 B.R. 802. App., pp. 22a-24a.

The decision of the U.S. Bankruptcy Court for the Eastern District of Wisconsin (McGarity, J.), which the district court reversed, is reported at 83 B.R. 564. App., pp. 25a-38a.

The Findings of Fact, Conclusions of Law, and Judgment of Divorce rendered by the Outagamie County, Wisconsin, Circuit Court has not been reported. Portions of this document are reprinted in the appendix. App., pp. 49a-61a.

JURISDICTIONAL STATEMENT

This is an appeal from the judgment and the majority opinion entered by the Court of Appeals on March 30, 1990. This Court has jurisdiction over the appeal under 28 U.S.C. § 1254(1), having granted the petition for a writ of certiorari on November 26, 1990. 59 U.S.L.W. 3391 (November 27, 1990). The petition was filed on August 27, 1990, pursuant to an extension of time granted by Justice Stevens.

No jurisdictional issues have been raised at any point in this case. The bankruptcy court had jurisdiction over the debtor's Chapter 7 petition under 28 U.S.C. § 157, the federal district court had original bankruptcy jurisdiction under 28 U.S.C. § 1334 and appellate jurisdiction under 28 U.S.C. § 158, and the Court of Appeals heard the case under 28 U.S.C. § 158(d).

FEDERAL STATUTES INVOLVED

11 U.S.C. § 522 provides in part:

Exemptions.

* * * *

(b) . . . an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. . . . Such property is—

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2) (A) of this subsection specifically does not so authorize; or, in the alternative,

(2) (A) any property that is exempt under . . . State or local law that is applicable on the date of the filing of the petition. . . .

* * * *

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor . . . except—

. . . .

(2) a debt secured by a lien that is—

(A) (i) not avoided under section (f) or (g) of this section. . . .

* * * *

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien. . . .

11 U.S.C. § 101 provides in part:

Definitions. In this title—

* * * *

(32) "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding;

(33) "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation.

STATE STATUTE INVOLVED

Wis. Stat. § 815.20. *Homestead exemption definition.*

(1) An exempt homestead . . . selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwise provided. . . .

STATEMENT OF THE CASE

For most American families, their home is their principal financial asset. For many, it is the only asset with substantial, lasting value. The states historically have recognized the homestead's unique contribution to the family, intangible as well as tangible, by providing a special measure of protection for it from the claims of creditors. In a contested divorce, the home's value and importance invariably make it the focus of the state court's obligation to ensure an equitable division of the marital estate. This case will determine the vitality of these established state interests in the family—by deciding whether they are complemented by the bankruptcy code or whether, in the words of the dissenting judge in the Court of Appeals, a debtor can use the code "to steal from his former wife. . . ."

A state court ordered Gerald J. Sanderfoot and Jeanne Farrey divorced on September 12, 1986, ending their marriage and dividing their marital estate in half. The court awarded Mr. Sanderfoot his wife's entire interest in the family's home, virtually all of the other assets and most of the liabilities of the marriage. To ensure an equal property division and to recognize Ms. Farrey's contribution to the marriage and her joint ownership of the marital estate, the divorce judgment required Mr. Sanderfoot to pay her about $29,000.00. The court secured that specific obligation with a lien on the home. Three months later, Mr. Sanderfoot filed for bankruptcy and ultimately avoided the lien under 11 U.S.C. § 522 (f)(1), eliminating Ms. Farrey's share of the marital estate.

Four courts of appeals, applying that provision of the bankruptcy code to remarkably similar facts, have reached remarkably dissimilar results. Only one circuit has been able to render a unanimous decision. In this case, a divided panel of the Seventh Circuit affirmed the federal district court's decision that permitted Mr. Sanderfoot to

avoid the lien. The Ninth Circuit is in accord. The Eighth and the Tenth Circuits, however, have refused to allow debtors to nullify divorce judgments that awarded homestead liens to the debtors' spouses. This Court's resolution of this dispute will have a substantial impact on the work of the federal courts and on the lives of married couples who, until now, have turned to the state courts for fairness and finality when their marriages dissolve.

The Divorce. The facts of this case are undisputed. Jeanne Farrey and Gerald Sanderfoot married on August 12, 1966. They eventually built a home, together, on 27 acres of land in Hortonville, Wisconsin, where they raised their three children. More than 20 years after their marriage, they were granted a divorce by the Outagamie County Circuit Court after a trial contesting child support, maintenance and the division of their property.

The state court's September 12, 1986 bench decision resolved all of the contested issues and terminated the marriage. *See* Wis. Stat. § 767.37(3). Embodied in a formal divorce judgment entered on February 5, 1987, App. at 49a-61a, the decision ordered Mr. Sanderfoot to pay child support, maintenance, and some of the attorneys' fees incurred by his wife. It also awarded each party precisely one-half of their $60,600.68 net marital estate. *Id.* at 56a, 61a. The decree reflected Wisconsin's statutory presumption that the marital estate "be divided equally between the parties." Wis. Stat. § 767.255.

For her share, Ms. Farrey received a few items of personal property and the right to half the proceeds from a court-ordered auction of furniture from the home. The court gave Mr. Sanderfoot sole title to all of the land and the family home, which it valued at $104,000.00, and all of the remaining personal property, including two cars and a business. App. at 51a. The court decree also allocated the couple's liabilities. After this initial assign-

ment of assets and debts, Mr. Sanderfoot had a net award of $59,508.79. Ms. Farrey had $1,091.90. *Id.* at 60a-61a.

To equalize the property division and reflect Ms. Farrey's property interests, the trial court awarded her $29,208.44, half of the difference in the value of their net assets. The court ordered Mr. Sanderfoot to pay that amount in two equal installments—the first due on January 10, 1987, the second on April 10, 1987. The court awarded Ms. Farrey, at the same time and in the same divorce decree, a lien against the family home to implement the property division. "[T]he lien shall remain attached to the real estate property of the Respondent [Mr. Sanderfoot]," the judgment said, "until the total amount of money is paid in full." *Id.* at 57a.

The court's September 12, 1986 bench decision and the divorce judgment itself explained the property division:

> [It is] a full, final, complete and equitable property division, in recognition of a species of community ownership of the marital estate resembling a division of the property between co-owners vested at the time of commencement of this action.

Id. at 58a. The judgment also "divested" each party of all "right, title and interest" in the property awarded to the other party "except as expressly provided. . . . Each party accepts the property herein in full satisfaction of all property rights and all obligations arising" from the marriage. *Id.*

The Bankruptcy Proceedings. On May 4, 1987, three months after the divorce judgment, Mr. Sanderfoot filed a Chapter 7 bankruptcy petition. *Id.* at 44a. By then, he still had not "complied with a single order of the state court." *In re Sanderfoot*, 83 B.R. 564, 565 (Bankr. E.D. Wis. 1988), App. at 22a, 26a. The facts were undisputed, the bankruptcy court noted, and Mr. Sanderfoot's conduct clear:

> He had not conducted the auction, delivered the personal property to his ex-wife, or made a single payment toward child support, maintenance or attorney fees. He had not made the cash payments that were ordered by the court to be made to his ex-wife as compensation for her interest in the [homestead] property.

Id. As a result, neither Ms. Farrey nor the state court ever released the lien on the homestead. Stipulated Facts and Issues of Law, ¶ 6, App. at 40a, 42a.

Mr. Sanderfoot listed the marital home on the schedule of assets submitted with his bankruptcy petition, identifying it as exempt homestead property and Ms. Farrey's lien as "[d]isputed." App. at 47a-48a; *see* Bankruptcy Rule 4003(a). The federal homestead exemption in 11 U.S.C. § 522(d)(1) is only $7,500.00. However, the bankruptcy code permits the debtor instead to invoke the state homestead exemption, 11 U.S.C. § 522(b)(2)(A), and Mr. Sanderfoot did that to try to protect his equity in the home "to the amount of $40,000."[1] Wis. Stat. § 815.20.

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[1] The bankruptcy court did not resolve the parties' dispute over the value of the home nor the collateral dispute over Mr. Sanderfoot's equity in it. The Court of Appeals and the district court concluded that, whatever the amount of equity he had, Ms. Farrey's lien impaired it under section 522(f)(1). *In re Sanderfoot*, 899 F.2d at 599 n.3, App. at 3a n.3; *id.* at 600 n.5 and n.6, App. at 4a n.5, 5a n.6; and, *id.* at 603 & n.13, App. at 11a & n.13. According to the debtor's bankruptcy schedules, moreover, the only other secured claims against the property were two mortgages totaling just under $50,000.00. App. at 47a. That left Mr. Sanderfoot with at least some equity that a judicial lien could impair, accepting even his bankruptcy valuation of the property at only $82,750.00. *See* 83 B.R. at 567, App. at 29a; *see also In re Pederson*, 875 F.2d 781, 782 & n.2 (9th Cir. 1989).

Regardless of Mr. Sanderfoot's equity, Ms. Farrey has at best a worthless unsecured claim unless she can enforce the lien. *See* 11 U.S.C. § 506(a). Personal debts are dischargeable in bankruptcy under 11 U.S.C. § 727(b). Unless they have been avoided, however, liens are not dischargeable. 11 U.S.C. § 522(c)(2)(A)(i); *see infra* at 12-13. The bankruptcy court entered a final order on February 10, 1989, discharging all of Mr. Sanderfoot's personal debts.

Mr. Sanderfoot next filed a motion under 11 U.S.C. § 522(f)(1) to avoid Ms. Farrey's lien against the property, claiming it was a judicial lien that impaired his homestead exemption. On March 9, 1988, the bankruptcy court denied Mr. Sanderfoot's motion. 83 B.R. at 571, App. at 38a; *see* App. at 39a. The court reviewed the bankruptcy code's legislative history to determine the purpose of the lien "fixing" and avoidance statute. "[T]he policy behind 11 U.S.C. § 522(f)(1) was not to circumvent a divorce court's decision," Judge M. Dee McGarity concluded, but to allow the debtor to prevent creditors from destroying statutory exemptions by suing the debtor shortly before bankruptcy. 83 B.R. at 566, App. at 28a. The "fixing of a lien on an interest of the debtor," the bankruptcy court found, had never occurred to trigger the avoidance statute:

> In this case, regardless of how title was previously held [by the divorcing parties], the debtor acquired his interest by virtue of the divorce judgment and subject to the lien. The lien did not attach to the debtor's interest, and it is accordingly not avoidable.

Id. at 33a.

Mr. Sanderfoot appealed the bankruptcy court's order to the U.S. District Court for the Eastern District of Wisconsin. On October 4, 1988, the district court reversed the bankruptcy court's decision and permitted Mr. Sanderfoot to avoid the lien. *In re Sanderfoot*, 92 B.R. 802 (E.D. Wis. 1988), App. at 22a-24a.

Judge Myron L. Gordon rejected the bankruptcy court's conclusion that the lien had not attached to the debtor's property. Instead, the district court found that the divorce judgment had extinguished *all* of the property interests held by the parties, creating new interests: Mr. Sanderfoot received the home, Ms. Farrey a lien against it. Thereafter, when Mr. Sanderfoot filed for bankruptcy, section 522(f)(1) allowed him to avoid the "judicial lien" that had "fix[ed]" against his property interest. *Id.*, App. at 24a.

The Court of Appeals' Decision. Ms. Farrey appealed, and the Seventh Circuit on March 30, 1990 affirmed the district court's decision. *In re Sanderfoot*, 899 F.2d 598 (7th Cir. 1990), App. at 1a-2a.[2] After acknowledging the "difficulty" of the issue, *id.* at 600, App. at 5a, the court's majority found dispositive the fact that the divorce judgment had conveyed sole title to the family's home to Mr. Sanderfoot. The court concluded that Ms. Farrey's lien against the property, obtained by "legal proceedings," fit the definition of "judicial lien" in 11 U.S.C. § 101(32) making it avoidable under section 522(f)(1). *Id.* at 603, App. at 11a. Like the district court, the Court of Appeals' majority ignored the statute's legislative history and purpose.

In a sharply-worded dissent, Judge Richard Posner said the majority's misunderstanding of the lien-avoidance provision had allowed the bankruptcy code to become a "tool by which bounders defraud their spouses." *Id.* at 606, App. at 18a. A proper reading of the statute, on the other hand, would recognize the lien and "do justice here without deforming the Bankruptcy Code." *Id.* at 607, App. at 20a. Since the lien "was created in the same document" that gave the husband title to the property, Judge Posner concluded, the "lien qualified that interest from the start. There was no instant at which [Mr.] Sanderfoot owned the property free and clear of the wife's interest." *Id.*, App. at 21a. Mr. Sanderfoot never had sole title to the property until the court imposed a lien on it and, accordingly, the lien was not avoidable.

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[2] The district court's decision eliminated Ms. Farrey's secured interest in the homestead and her secured claim against the debtor's estate, making it a "final" decision and order appealable under 11 U.S.C. § 158(d) even though the bankruptcy proceeding itself had not concluded. *See Matter of Morse Electric Co., Inc.*, 805 F.2d 262, 264 (7th Cir. 1986); *Matter of Fox*, 762 F.2d 54, 55 (7th Cir. 1985).

The Seventh Circuit's majority and dissenting opinions both analyzed the conflict in the circuits. When the bankruptcy court denied Mr. Sanderfoot's motion to avoid the lien, it relied on *Boyd v. Robinson*, 741 F.2d 1112, 1114-15 (8th Cir. 1984), which held that a lien awarded in a divorce judgment protects the "preexisting interest" of the spouse who loses title to the home. The lien did not attach to the debtor's interest, the Eighth Circuit's majority concluded, because the divorce judgment awarded the debtor the spouse's interest in the home already subject to the lien. Reversing the bankruptcy court in this case, the Seventh Circuit affirmed the district court, which specifically had "rejected the reasoning of *Boyd* and held that the divorce decree both extinguished all preexisting interests and simultaneously created new interests." 899 F.2d at 600, App. at 5a.

The Seventh Circuit's majority relied on *In re Pedersen*, 875 F.2d 781 (9th Cir. 1989), a case that had endorsed the position of the dissenting judge in the *Boyd* decision: "the lien *must* have attached to [the debtor's] interest in the house, for no one else possessed any ownership interest in the house." *Id.* at 783, *quoting* 741 F.2d at 1115 (Ross, J., dissenting) (emphasis in the original). Judge Posner's dissent here endorsed the *Boyd* majority's decision and its rationale, which he said had been adopted "by most bankruptcy judges." App. at 21a.[3]

The majority decisions in the Seventh and Ninth Circuits also cited the holding in *Maus v. Maus*, 837 F.2d 935 (10th Cir. 1988), that a lien created by a divorce decree was a "judicial lien" if the property settlement agreement incorporated into the decree specifically made the grant of the homestead property free and clear of all

[3] The dissent cited three illustrative bankruptcy court decisions, 899 F.2d at 607, App. at 21a. The majority opinion itself noted 11 other bankruptcy and district court decisions that also had refused to apply the lien avoidance statute to similar facts. *Id.* at 601 & n.7, App. at 7a; *id.* at 604 & n.14, App. at 13a. Neither compilation purported to be exhaustive, and a full list of the reported decisions on this issue appears in the Appendix to this brief.

claims of the other spouse. However, even these decisions recognized that the more recent Tenth Circuit cases had expressly "limited" the application of *Maus* to cases where "the divorce decree itself does not specifically create a lien." 899 F.2d at 603, App. at 12a, *quoting In re Borman*, 886 F.2d 273, 274 (10th Cir. 1989); *accord In re Donahue*, 862 F.2d 259 (10th Cir. 1988). They also distinguished *Maus* because it did not involve a contested divorce. *See infra* at 14 n.5. The latest Tenth Circuit cases concluded, by contrast, without dissent, that the simultaneous award of homestead property to one spouse and a homestead lien to the other spouse gave rise to an "equitable lien against the property, which secured the debt." 886 F.2d at 274.

In their result, then, if not in their rationale, the Seventh and Ninth Circuits are allied against the Eighth and Tenth Circuits over the interpretation of section 522 (f)(1). There is no disagreement among the circuits, however, on one point: the federal courts have encountered "some difficulty in defining precisely the interest of an ex-spouse arising out of a property settlement made during a divorce proceeding." *Donahue*, 862 F.2d at 262. The waters have been "muddied" by the tension inherent among these cases. *In re Rittenhouse*, 103 B.R. 250, 252 (D. Kan. 1989).

Statutory Framework. For all of the controversy, there is little legislative history for section 522(f)(1) and its complementary definitions in the bankruptcy code. The provision was incorporated in the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, a comprehensive revision of bankruptcy law, and the section has not been amended substantively. In chapter 7, the code gives individual debtors the opportunity for a "fresh start," providing for the liquidation of their assets to pay some of their liabilities and then discharging most of the debtor's unpaid debts. *See* 11 U.S.C. §§ 523, 541, 726, 727.

There are significant exceptions, however, to the law's liquidation and dischargeability provisions. Section 522 establishes a series of "exemptions" that permit a debtor to insulate specific assets from the bankruptcy process, putting them beyond the reach of creditors. "[P]roperty exempted under this section is not liable . . . for any debt of the debtor. . . ." 11 U.S.C. § 522(c). In a "significant" break with the past, the 1978 law gave individual debtors "a choice between exemption systems." H.R. Rep. No. 595, 95th Cong., 1st Sess. 360-61 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5963, 6316-17. Rather than relying solely on the exemptions defined by state law, a debtor now can choose either the exemptions available under "State or local law," 11 U.S.C. § 522(b)(2)(A), or the new federal exemptions specified in section 522(d) unless state law prohibits the use of the federal exemptions. 11 U.S.C. § 522(b)(1).[4]

The reform act did *not* change the fundamental nature of property subject to the bankruptcy code or to the federal or state exemptions. Liens and other secured interests generally survive bankruptcy.

> Property may be exempted even if it is subject to a lien, but only the unencumbered portion of the property is to be counted in computing the "value" of the property for the purposes of exemption. . . . The remaining value of the property will be dealt with in the bankruptcy case as is any interest in property that is subject to a lien.

H.R. Rep. No. 595 at 361, 1978 U.S. Code Cong. & Ad. News at 6316-17. In fact, Congress in 1978 specifically preserved a concept that has been integral to the law of

[4] While many states have chosen to eliminate the debtor's ability to choose the federal exemptions, Wisconsin has not. This Court heard oral argument on November 5, 1990 in a case that may determine the application of section 522(f) in states that have "opted out" of the federal exemptions. *In re Owen*, 877 F.2d 44 (11th Cir. 1989), *cert. granted sub nom. Owen v. Owen*, —— U.S. ——, 110 S.Ct. 2166 (1990).

bankruptcy for at least 100 years: "[t]he setting apart of the homestead to the bankrupt [debtor] . . . did not relieve the property from the operation of liens created by contract before the bankruptcy." *Long v. Bullard*, 117 U.S. 617, 620-21 (1886). A discharge in bankruptcy "will not prevent the enforcement of valid liens—even on exempt property." 3 *Collier on Bankruptcy*, § 522.04, p. 522-17 (15th ed. 1989); *see Louisville Bank v. Radford*, 295 U.S. 555, 582-83 (1935) (bankruptcy does not destroy a mortgage "even of exempt property").

While preserving the *Bullard* principle in section 522(c)(2)(A)(i), Congress did amend the bankruptcy law to permit a debtor to avoid the "fixing" of some liens, *see, e.g.*, 11 U.S.C. §§ 545 (statutory liens) and 547 (general preference powers), and to provide additional protection for the exemptions recognized in section 522. *See* H.R. Rep. No. 595 at 126-27, 1978 U.S. Code Cong. & Ad. News at 6087-88. Section 522(f), at issue here, protects the debtor. Notwithstanding the established distinction between debts and liens, the debtor *can* avoid a judicial lien "on any property to the extent that the property could have been exempted in the absence of the lien." H.R. Rep. No. 595 at 362, 1978 U.S. Code Cong. & Ad. News at 6318. The debtor also can avoid any "nonpurchase-money security interest" in any specified household and personal goods, tools and implements. 11 U.S.C. § 522(f)(2).

There is *only* one substantive explanation for the lien avoidance provision in the code's entire legislative history:

> The first right [sec. 522(f)(1)] allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions.

H.R. Rep. No. 595 at 126-27, U.S. Code Cong. & Ad. News at 6087-88. Most of the opinions that have refused to allow a debtor to aviod a homestead lien awarded

on divorce have quoted this passage. *See, e.g., In re Sanderfoot*, 899 F.2d at 606, App. at 21a (Posner, J., dissenting); *In re Sanderfoot*, 83 B.R. at 566, App. at 28a; *In re Thomas*, 32 B.R. 11, 12 (Bankr. D. Or. 1983).

The exemption concept embodied in section 522(f)(1) had its genesis in the Bankruptcy Act of 1867, 14 Stat. 523, later expanded by section 67 of the 1898 Bankruptcy Act, 30 Stat. 544. *See* 4 *Collier on Bankruptcy*, § 67.01, pp. 18-19 (14th ed. 1978). Before its repeal, section 67a invalidated "[a]ny lien against the bankrupt's property obtained by attachment, judgment, levy or other legal or equitable process or proceedings within the four-month period" before filing. 11 U.S.C. § 107(a) (1976); 1A *Collier on Bankruptcy*, § 6.12, pp. 865-66 (14th ed. 1978). The debtor had to be insolvent at the time the lien attached, however, to qualify for section 67a's protections. 11 U.S.C. § 107(a) (1976); *see also In re Ashe*, 712 F.2d 865, 866-8 (3d Cir. 1983), *cert. denied sub nom. Commonwealth Nat'l Bank v. Ashe*, 464 U.S. 1024 (1984), *reh'g denied*, 466 U.S. 963 (1984). The reform act eliminated the insolvency and time limit provisions, making any judicial lien on exempt property theoretically avoidable.

There is even less legislative history for the definitions applicable to section 522(f). While the bankruptcy code defines a "lien" generally at 11 U.S.C. § 101(33), it recognizes three specific liens: the "judicial lien" at issue here in section 101(32), a "statutory lien" in section 101(47), and a "security interest" that, under section 101(45), means a "lien created by an agreement."[5] The

[5] The property division in this case was contested. Stipulated Facts and Issues of Law, ¶ 4, App. at 41a. Accordingly, this appeal does not test the applicability of section 522(f)(1) to a consensual lien—imposed and accepted, for example, by the parties through a stipulation—that, in turn, is incorporated into a divorce judgment. *See, e.g., Maus v. Maus*, 837 F.2d 935; *In re Hart*, 50 B.R. 956, 961 (Bankr. D. Nev. 1985). It would be ironic, at best, if a lien imposed by a court in a contested property division could be avoided while a lien imposed by the parties themselves could not be avoided. That would reward the litigious spouse who forces the court to make the property division.

three lien types may be mutually exclusive, *see* S. Rep. No. 989, 95th Cong., 2d Sess. 25 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5811, but they are not exhaustive. A number of bankruptcy court decisions have applied an "equitable lien" theory to refuse to allow a debtor to avoid a homestead lien held by a former spouse. *See, e.g., In re Borman*, 886 F.2d 273; *In re Donahue*, 862 F.2d 259; *Matter of Bailey*, 20 B.R. 906 (Bankr. W.D. Wis. 1982); *infra* at 25 & n.12.

In addition to section 522(f)(1), the code gives the debtor or a trustee special powers with respect to liens. Property can be sold "free and clear" of any lien under 11 U.S.C. § 363(f), but the lien then attaches to the proceeds of the sale. Statutory liens can be avoided under section 545, and a trustee has the formidable "preference" powers of section 547(b), which enable the trustee to "avoid any transfer of an interest of the debtor in property . . . [made] on or within 90 days before the date of the filing of the petition. . . ." While the bankruptcy petition in this case came 89 days after the entry of the divorce judgment, neither the trustee nor the debtor invoked the preference provisions to try to avoid the homestead lien. *See* 11 U.S.C. § 547(c)(1), (3) ("new value" exception to preference powers).

SUMMARY OF ARGUMENT

Gerald Sanderfoot and Jeanne Farrey were married for 20 years. They had three children and a home together. They were divorced in 1986 and, within just a few months, Gerald Sanderfoot filed for bankruptcy. When the process finally ended, the federal courts had discharged all of Mr. Sanderfoot's personal debts. He still had the family's homestead under the state homestead exemption, and the financial institution that lent them the money to buy the home in 1979 still had its mortgage, because security interests like mortgages survive even bankruptcy and the homestead exemption.

Jeanne Farrey had nothing. The bankruptcy process protected her former husband, but it deprived her of the "equal" property division promised by the divorce court and any tangible benefit from 20 years of marriage.

Before their divorce, the parties in this case jointly owned their marital property under state law. The state court that divorced them split the property under a state law that presumptively required the marital estate "to be divided equally." The divorce court awarded Mr. Sanderfoot his wife's undivided half interest in the home. It gave her, in return, a few pieces of personal property and a lien on the home to recognize her contribution to the marriage and to ensure that her husband actually paid the money ordered to compensate her for her share of the home and the rest of the marital estate. Mr. Sanderfoot tried to eliminate all of that through the simple expedient of filing for bankruptcy, and the federal district court and the Court of Appeals applied the bankruptcy code and its lien avoidance provision to let him do it.

This case has had devastating consequences for Jeanne Farrey. Its consequences for the federal and state court systems are no less. The courts of appeals are in disarray on the issue: two will permit a debtor to avoid a judicial lien on the family homestead awarded in a divorce to protect the former spouse, and two will not. This Court's decision will determine whether the states retain the ultimate authority to provide for the full, fair and final disposition of property in a divorce. It will determine as well whether the bankruptcy code complements or collides with state law and whether the federal court system, already taxed by an alarming rise in personal bankruptcies, will become the court of last resort for dissatisfied litigants in the state divorce courts.

The Seventh Circuit's majority characterized its own decision as "harsh" but, given the command of section 522(f)(1), inescapable. Yet the statute's "plain language" permits only the opposite conclusion: it does *not*

permit a debtor to avoid a lien awarded a spouse simultaneously with the transfer of a homestead interest on divorce, particularly when the state homestead exemption itself recognizes the lien's validity. Far from being in conflict with the bankruptcy code's text, moreover, the law's legislative history and purpose support it. Congress designed the lien avoidance statute to protect the homestead exemption against creditors who rush to judgment before the property owner files for bankruptcy. Congress did not intend to frustrate the established state interests expressed in the divorce law and the homestead exemption.

ARGUMENT

The exclusive power of Congress to provide "uniform laws on the subjects of bankruptcies" is as old as the Constitution. U.S. Const., art. I, § 8. The pre-eminent authority of the states in matters of domestic relations has a lineage equally established. In this case, these interests converge in the application of a single, deceptively simple provision of the bankruptcy code.

When state divorce courts divide a marital estate, they commonly award one party sole title to the family home and the other party property of commensurate value. If there are few readily divisible assets, however, courts often order the party awarded the homestead to make cash payments to balance the scale, simultaneously imposing a lien on the family's home to secure those payments. That is what happened in this case, and it happens frequently in the 1.2 million divorces granted every year in this country.

Gerald Sanderfoot attempted to nullify the state court's divorce judgment and its "equal" division of property by filing for bankruptcy and invoking section 522(f)(1) to avoid Jeanne Farrey's court-awarded lien against the family's home. This Court will decide whether Mr. Sanderfoot had the statutory right to do that. In the process, it will decide as well whether property divisions in di-

vorce will be ultimately resolved not in the state courts under state law but in the federal courts under federal law.

I. IN AVOIDING THE PETITIONER'S LIEN, THE COURT OF APPEALS MISAPPLIED THE LANGUAGE OF THE BANKRUPTCY CODE IN SECTION 522(f).

The clash between the majority and dissenting opinions in this case reflects the tone and substance of the judicial debate over the lien avoidance statute in all of the circuits that have addressed it. Acknowledging the harsh and inequitable result of its own decision, the Seventh Circuit's majority nevertheless found itself "constrained to apply the law as plainly written." 899 F.2d at 605, App. at 16a. The dissent, using the same analysis and "adhering to the precise contours of the lien-avoidance section," would reach the opposite result. *Id.* at 607, App. at 20a.

Both opinions properly recognized that statutory interpretation "must begin" with the statute's "plain language." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). It should end there in this case with the reversal of the decision of the U.S. Court of Appeals for the Seventh Circuit. The turning point in this case *is* the text of section 522(f)(1). This Court should reverse the Seventh Circuit because the statute's language, read literally or in context with its legislative history, requires that result.

A. The Lien Should Not Be Avoided Because It Did Not Fix On The Debtor's Pre-existing Property Interest.

> "[T]he debtor may avoid the fixing of a lien on an interest of the debtor in property. . . ."

11 U.S.C. § 522(f)(1).

Before their divorce on September 12, 1986, Gerald Sanderfoot and Jeanne Farrey owned their home and land together. Under Wisconsin's marital property law, effective January 1, 1986, each party had a "present undivided one-half interest in each item of marital property." Wis. Stat. § 766.31(3).[6] After their divorce, only Mr. Sanderfoot owned the home and the land, encumbered by a lien imposed simultaneously with the transfer of title by the state court to compensate Ms. Farrey for her property interests in the marriage.

Had the lien been awarded either one day *before* the divorce on Mr. Sanderfoot's undivided half interest or one day *after* the divorce on his title, the lien might be subject to the avoidance statute. In this case, however, three critical events—divorce, the transfer of Ms. Farrey's entire interest to Mr. Sanderfoot, and the court's imposition of the lien to compensate Ms. Farrey—occurred simultaneously in the same bench decision and in the same divorce judgment.

The Seventh Circuit majority misread the statute when it focused on the "fixing of a [judicial] lien" without regard for the complementary phrase "on an interest of the debtor." While the term "fix" has a variety of dictionary definitions, it means in the standard legal sense to "fasten a liability upon one. . . ." *Black's Law Dictionary* 573 (5th ed. 1979). (The word derives from the Latin for "fasten" or "attach.")

By definition, there must be a pre-existing interest to which the lien can fix, fasten or attach itself. The very use of the participle form "fixing" emphasizes that the

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[6] Moreover, the presumption in section 767.255 of the state divorce code that property will be divided equally means the property is "effectively co-owned" before the divorce. *Krueger v. Department of Revenue*, 124 Wis. 2d 453, 460, 369 N.W.2d 691 (1985). The divorce judgment in this case accurately characterized the award as "a division of the property between co-owners . . . ." App. at 58a; *see* Wis. Stat. § 766.75 (marital property retains its character on divorce "except as provided otherwise in a decree . . . ."); § 706.02(1)(f) (conveyance of homestead interest must be signed by both spouses); and, § 861.01 (survivorship rights).

statute applies only to liens that become fixed *after* the debtor acquires the interest.[7] Indeed, were that not the case, the phrase "the fixing of" would be superfluous. Congress simply would have provided that "the debtor may avoid [] a lien on an interest of the debtor. . . ."

The Seventh Circuit's majority found "simply irrelevant" Ms. Farrey's prior undivided half interest in the property and Mr. Sanderfoot's corresponding interest in the same property. 899 F.2d at 602, App. at 10a, *quoting In re Duncan*, 85 B.R. 80, 82 (W.D. Wis. 1988). That was a mistake. Under statutory and common law concepts, Jeanne Farrey had an undivided half interest in the property until the moment of their divorce that cannot be ignored.

The only "interest" of the debtor affected by this lien is his sole title to the homestead, the title awarded him with the divorce by the state court, and not any pre-existing interest he might have had in the homestead as a joint tenant or a tenant in common or under any community property concepts. Any judicial lien that had attached to the undivided half interest he had in the homestead before the divorce would have been subject to the lien avoidance statute. Jeanne Farrey's lien, however, is different. She obtained the lien in return for her joint interest in the property, and Mr. Sanderfoot obtained the property subject to the lien. The lien came with the property interest he received in the divorce judgment, and a debtor can never avoid a lien on an interest

[7] The statutory language "[a]rguably" implies only a "*prospective* avoidance, that is, of a judicial lien not yet fixed; therefore the debtor could not avoid a lien that was existing at the time of the commencement [sic] of the case." Bowman, *Avoidance of Judicial Liens that Impair Exemptions in Bankruptcy: The Workings of 11 U.S.C. § 522(f)(1)*, 68 Am. Bankr. L.J. 375, 385 n.68 (1989) (emphasis in the original); *see* 11 U.S.C. § 545 (avoidance of statutory liens) and 11 U.S.C. § 549 (post-petition liens). This Court need not adopt that position to conclude that the debtor cannot avoid a lien that arises *simultaneously* with the debtor's acquisition of the property.

the debtor acquired subject to the lien. *See supra* at 13.

Section 522(f)(1) permits a debtor to avoid the "fixing of a lien" on the debtor's interest in property, but that "fixing" never happened in this case. The state court created Mr. Sanderfoot's full property interest, by transferring Ms. Farrey's half interest to him, at the same time it created the lien for Ms. Farrey. He acquired the property through the divorce judgment "free and clear" of any claim "except as expressly provided for in this [order]. . . . ," App. at 58, and the order imposed a lien. Jeanne Farrey's lien did not fix to his interest. It was always there.

In *In re Owen*, 877 F.2d 44, *supra* at 12 n.4, the Court of Appeals affirmed a decision preventing the application of 522(f)(1) because the debtor never owned the homestead free and clear of the lien. The creditor in that case obtained a judicial lien, recording it in a Florida county even before the debtor owned property there. When the debtor did buy property there, the lien "fixed" on it. He then filed for bankruptcy and moved to avoid the lien.

The court found the lien not avoidable for two reasons. First, there was no impairment of the debtor's homestead exemption because, under Florida law, the exemption was "specifically subject" to a "lien [that] came into existence prior to the property attaining homestead status." *Id.* at 46-47. Second, "Congress did not intend through section 522(f) . . . to provide a federal exemption greater than that protected by state law where the exemption is created by state law." *Id.*

The purpose of section 522(f), the Eleventh Circuit concluded, was "to protect debtors from the race to judgment often occurring just prior to a debtor filing bankruptcy." *Id.* A section 522(f)(1) judicial lien did not attach to the debtor's property in *Owen* because "[he] never held this property [without] this judicial lien."

Id. The "debtor never owned an unencumbered interest in the real property in question, since the lien attached to the property *simultaneously* with acquisition of the property." *In re Owen*, 86 B.R. 691, 694 (M.D. Fla. 1988) (emphasis added).[8] That is precisely what happened here.

This Court made the same point in an analogous case under the 1898 Bankruptcy Act, *Chicago Board of Trade v. Johnson*, 264 U.S. 1 (1924).[9] The decision permitted a trustee to sell the debtor's seat on a commodities exchange but only after the claims of his creditors had been satisfied. Under the exchange's rules, the creditors could block any sale of the seat until they had been paid, creating in essence a common law lien.

> The lien, if it can be called such, is inherent in the property in its creation, and it can be asserted at any time before actual transfer [of the property]. Indeed, the danger of bankruptcy of the member is perhaps the chief reason, and a legitimate one, for creating the lien.

Id. at 15. While the lien at issue here may well be a judicial lien, it is no less "inherent in the property in its creation." It did not, sometime later, fix on the debtor's interest.

To arrive at its decision, the majority had to assume that Gerald Sanderfoot first acquired sole title to the family's home and, only then, that the lien somehow fixed to it—else there would be no "interest" to which the lien

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[8] The same principle has been applied consistently in cases that do not involve property divisions on divorce. *See, e.g., McCormick v. Mid-State Bank & Trust Co.*, 22 B.R. 997 (W.D. Pa. 1982); *Matter of Stephens*, 15 B.R. 485 (Bankr. W.D. N.C. 1981); *Matter of Hulk*, 8 B.R. 444 (Bankr. D. Conn. 1981).

[9] The case retains its vitality. *See In re Loretto Winery, Ltd.*, 898 F.2d 715, 718 (9th Cir. 1990). In addition, the *Board of Trade* decision has been codified in 11 U.S.C. § 363(f). 124 Cong. Rec. H11089 (daily ed. Sept. 28, 1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 6436, 6463.

attached. 899 F.2d at 601, App. at 8a.[10] Yet never, not even for a moment, did he have sole title to the real estate without the lien that came with sole title. "The lien qualified that interest from the start," Judge Posner wrote. "There was no instant at which Mr. Sanderfoot owned the property free and clear of the wife's interest." 899 F.2d at 607-08, App. at 21a. The lien cannot be avoided because it never fixed to the debtor's property interest.

B. The Lien Should Not Be Avoided Because It Did Not Impair An Exemption To Which The Debtor Otherwise Would Be Entitled.

> "[T]he debtor may avoid the fixing of a lien . . . to the extent that such lien impairs an exemption to which the debtor would have been entitled. . . ."

11 U.S.C. § 522(f)(1).

The debtor chose the state homestead exemption no doubt because, at $40,000.00, it exceeded by more than fivefold the federal homestead exemption in 11 U.S.C. § 522(d)(1). While the Seventh Circuit discussed the application of the state exemption statute to the debtor's homestead, it did so *only* from a financial standpoint. It concluded that Ms. Farrey's lien did, in fact, "impair" at least part of Mr. Sanderfoot's equity in the home, leaving "the bankruptcy court [on remand] to determine in the first instance the value of [the] homestead, and thus the exemption *amount* to which he is entitled." 899 F.2d at 603, App. at 11a (emphasis added). The majority ignored the balance of the section—"to which the debtor would have been entitled"—and, with it, the language of the very state exemption statute chosen by the debtor.

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[10] Indeed, the *Sanderfoot* majority adopted the Ninth Circuit's position: "the state court awarded the homestead to the non-debtor spouse *before* imposing the lien." 899 F.2d at 601, App. at 8a, *citing In re Pederson*, 875 F.2d at 783 (emphasis added). Whatever the facts of *Pederson*, that did not happen here. Even the district court in this case concluded that the parties' "[n]ew interests were *simultaneously* created." 92 B.R. at 803, App. at 24a.

Wisconsin generously has made a family's home "exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000. . . ." Wis. Stat. § 815.20. However, the statute's exemption itself contains an exception: it does *not* "exempt from execution . . . mortgages, laborers', mechanics' and purchase money liens and taxes . . . ."

A judicial lien, given in a divorce court in Wisconsin, *is* a mortgage. And a mortgage, in Wisconsin, is *not* subject to the homestead exemption even if it has been created by a judicial lien. The state supreme court in *Wozniak v. Wozniak*, 121 Wis. 2d 330, 359 N.W.2d 147 (1984), unequivocally established that principle when it enforced a judicial lien created in a divorce judgment against a surviving joint tenant. Under state law, the "transfer of property as security, regardless of the form thereof, is a mortgage." *Id.* at 336.

In that case, the divorce judgment awarded Opal Wozniak the real estate she had owned in joint tenancy with the parties' grandson. The court simultaneously awarded her spouse a lien on the property "to secure payment to him" of about $8,800.00. When Mrs. Wozniak died, her former husband brought a foreclosure action under the state statute that made the grandson's right of survivorship "subject to" any real estate "mortgage, security interest or statutory lien." Wis. Stat. § 700.24. The supreme court affirmed the foreclosure judgment because, it concluded, the judicial lien awarded in the divorce was, in fact, a mortgage enforceable under section 700.24 and not "merely a judgment lien" that would be extinguished automatically upon the joint tenant's death.

> Even though the term "mortgage" was not used in the divorce judgment, [Mr.] Wozniak was awarded a lien on a specific parcel of real estate as security for the payment of a sum of money, bearing interest at a specific rate, and due at a specific date.

121 Wis. 2d at 338. "The purpose of the instrument is the controlling feature. . . . If that is security, the instrument is treated as a mortgage and nothing else."

Smith v. Pfluger, 126 Wis. 253, 256, 105 N.W. 476 (1905).

The "judicial lien" at issue here has identical characteristics. It was imposed against specific real estate as security for the payment of a specific sum of money due in two specific installments pursuant to the transfer of an interest in that real estate from one spouse to the other on divorce. Like mortgages generally and the *Wozniak* divorce judgment, moreover, Ms. Farrey recorded with the county register of deeds "the portion of the judgment [the lien against the homestead] which affects title to real estate. . . ." Wis. Stat. § 767.255.[11]

The Seventh Circuit's majority discussed the state exemption statute, but it analyzed the *Wozniak* decision only to dismiss the argument that state law could characterize a judicial lien as an "equitable lien" and, accordingly, escape the reach of section 522(f)(1). 899 F.2d at 604 n.17, App. at 14a n.17. Regardless of the merits of that argument,[12] it misses the point. The provisions of state law should be dispositive in this case, not because they create an "equitable lien," but because they define and limit the state exemption that the debtor himself has chosen.

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[11] The spouse who held the lien in *In re Donahue*, 862 F.2d 259, failed to record the decree before the bankruptcy, yet the Court of Appeals still refused to permit the debtor to avoid the lien. *Id.* at 260 n.1.

[12] A number of bankruptcy courts have refused to avoid a lien created in a divorce judgment by calling it an "equitable lien" designed to prevent the unjust enrichment of the debtor spouse who obtains sole title to the property. *See, e.g., In re Borman*, 886 F.2d at 274; *Matter of Bailey*, 20 B.R. at 914. The "equitable lien" in this case would not be subject to the state exemption statute because it qualifies either as a "mortgage" under the *Wozniak* decision or as a "purchase money lien" under the same statute.

Under the 1898 Bankruptcy Act, even before the advent of section 522(f)(1), courts recognized equitable liens created in divorce judgments even though the debt resulting from the property division was dischargeable. *Caldwell v. Armstrong*, 342 F.2d 485 (10th Cir. 1965); *In the Matter of Thumm*, 2 Bankr. Ct. Dec. (CRR) 1347 (Bankr. E.D. Wis. 1976).

Mr. Sanderfoot could not avoid the other secured claims against his bankruptcy estate: the two mortgages listed on the schedule of secured claims. App. at 47a. Even though they clearly "impair" his interest, they fall within the explicit exception in Wis. Stat. § 815.20 for "mortgages, laborers', mechanics' and purchase money liens and taxes. . . ." And, under Wisconsin law, so does Jeanne Farrey's lien.

The debtor cannot elect the benefits of a "State or local law" under 11 U.S.C. § 522(b)(2)(A) and reject the limitations of the same state or local law. *Matter of Allen*, 725 F.2d 290, 292 (5th Cir. 1984), *reh'g denied sub nom. Allen v. Hale County State Bank*, 729 F.2d 1459 (5th Cir. 1984); *In re Pine*, 717 F.2d 281, 284 (6th Cir. 1983), *cert. denied sub nom. Pine v. Credithrift of America*, 466 U.S. 928 (1984). To the contrary, the debtor can avoid a judicial lien *only* "to the extent that the property could have been exempted in the absence of the lien. . . ." H.R. Rep. No. 595 at 362, 1978 U.S. Code Cong. & Ad. News at 6318. Yet the appellate court and the district court disregarded the qualitative limitations imposed by the state homestead law and, on that basis alone under section 522(f)(1), their decisions should be reversed.

Mr. Sanderfoot filed for bankruptcy less than a month after the second installment payment became due. If Ms. Farrey had the opportunity to file a foreclosure action, the procedure approved by the state supreme court in *Wozniak*, Mr. Sanderfoot would not have been able to claim a homestead exemption under Wis. Stat. § 815.20 to defeat the lien. He cannot now use the federal bankruptcy code to avoid Ms. Farrey's lien because, under the state exemption he chose, he was not "entitled" in the first place to exempt the homestead from the mortgage lien imposed by the divorce judgment.

Section 522 protects some of the debtor's property, placing it beyond the reach of creditors, by exempting it from the bankruptcy process. In subsection (f), Congress has protected the exemptions, in turn, by permitting a debtor to avoid specific liens, including a judicial

lien, against exempt property. Gerald Sanderfoot, no less than every other Chapter 7 debtor, should be able to use the statute to protect the exemption on his own property interest. He has no right, however, to protect more than the state law permits him to protect—indeed, no right to try to use federal law to frustrate that state law—at Jeanne Farrey's expense by avoiding her lien.

II. SECTION 522(f)'S HISTORY AND PURPOSE ONLY EMPHASIZE THAT CONGRESS DID NOT INTEND TO UPSET STATE LAW BY PERMITTING A DEBTOR TO DEPRIVE HIS SPOUSE OF BOTH HER HOMESTEAD INTEREST AND HER HOMESTEAD LIEN.

The Seventh Circuit's majority expressed its dismay at the "harsh" result of its decision, finding itself "constrained to apply the law as plainly written." 899 F.2d at 605, App. at 16a. While the result did "place the crown of success on [a] vicious scheme," *id.*, App. at 18a (Posner, J., dissenting), it was neither necessary nor mandated by the statute. To the contrary, this Court should reverse the Seventh Circuit because the statute's text requires it *and* because the statute's context, legislative history and purpose support that text.

A. The Seventh Circuit's Decision Conflicts With The Statute's Purpose And Legislative History.

The majority began its analysis of section 522(f)(1) by acknowledging the disparate results reached by the courts that had interpreted the statute. *Id.* at 600, App. at 5a. It then disregarded its own conclusion and pronounced the language of the statute "clear" and the issue "straightforward." The Seventh Circuit's majority summarily dismissed as "implausible and unsupported by the language of the Code" at least 12 separate decisions by other courts that disagreed with it. *Id.* at 604 & n.14, App. at 13a; *see supra* at 10 n.3; *see also* Appendix.

It is difficult to accept the majority's conclusion that the statute "clearly" permits Gerald Sanderfoot to avoid

the lien when so many courts have reached the opposite conclusion. A statute is ambiguous if it is capable of being construed in different ways by reasonably well-informed people. Indeed, "[t]he fact that a statute has been interpreted differently by different courts has been cited as evidence that the statute is ambiguous and unclear." 2A C. Sands, *Sutherland on Statutory Construction*, § 46.04 (4th ed. 1984).

The majority steadfastly refused to look beyond the statute's "plain meaning" despite all of the decisions adverse to it and despite the "seemingly inequitable results in a divorce setting." 899 F.2d at 605, App. at 15a. Feeling compelled to "give effect to the policy decisions embodied in the express language," *id.*, the Seventh Circuit decided the case without ever penetrating the surface of the statute. It determined the "clear legislative intent" of Congress, *id.* at 16a, without ever taking into account the purpose of the statute stated in its legislative history.

Even were the language as "plain" as the majority has suggested, however, that cannot end the inquiry. An appellate court should set aside the "strict language" where the " 'literal application of a statute will produce a result demonstrably at odds with the intention of the drafters. . . .,' " *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. at 244 (citation omitted), *cited with approval*, 899 F.2d at 600, App. at 6a. Moreover, when a statute's meaning appears superficially clear, but contains ambiguities, a court should look to the legislative history to help construe it. *See United States v. Sec. Indus. Bank*, 459 U.S. 69, 82, n.12 (1982). The Seventh Circuit majority's disregard for those admonitions resulted, in the words of the dissenting judge, in "a perversion of bankruptcy law." 899 F.2d at 606, App. at 18a.

The purpose of section 522(f) "appears unmistakably from legislative history the purpose and significance of which are unquestioned." *Id.* It is to prevent unsecured creditors from obtaining otherwise enforceable judicial

liens as soon as they learn a debtor is about to file for bankruptcy, thereby frustrating the exemptions allowed by the bankruptcy code and state law. The bankruptcy code's *only* legislative history on this point is unequivocal:

> [Section 522(f)(1)] allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions.

H.R. Rep. No. 595 at 126-27, 1978 U.S. Code Cong. & Ad. News at 6087-88. Thus, Congress intended to permit a debtor to avoid only those liens "that became fixed *after* the debtor acquired the interest upon which they became fixed." *In re Scott*, 13 B.R. 613, 615 (Bankr. W.D. Okla. 1981) (emphasis in original).

The lien in this case was not created to permit a creditor to defeat a debtor's exemption. The divorce court awarded the lien to secure an obligation the court imposed on the debtor-spouse in an exchange for the court's simultaneous award of his wife's homestead and other property interests to the debtor. The lien did not arise in the context of impending bankruptcy, but during a divorce where the relationship of the parties is not that of debtor and creditor. "This distinction is crucial. It is clear that Congress intended to include within the ambit of § 522(f)(1) only those lien interests created in favor of creditors, not spouses." *In re Thomas*, 32 B.R. 11, 12 (Bankr. D. Or. 1983).

The Seventh Circuit purportedly based its decision on the familiar and accepted principle that it is for Congress, not the courts, to make policy. When Congress has made a decision, the courts must respect its judgment. 899 F.2d at 605, App. at 16a. Yet the Seventh Circuit's majority ignored the stated purpose of Congress when it enacted the statute, achieving a result "that does not promote, but instead denies, simple justice—layman's

justice." *Id.* at 607, App. at 19a-20a (Posner, J., dissenting).

The purpose of section 522(f) is to protect "the debtor's 'fresh start' from the [the] predatory credit practices" of judicial lien creditors. Cross, *The Application of Section 522(f) of the Bankruptcy Code in Cases Involving Multiple Liens*, 6 Bankr. Dev. J. 309, 314 (1989) ("Cross"). Ms. Farrey's lien is not the result of a predatory credit practice, but rather a divorce decree where she surrendered her entire interest in the family's property including its home. *See supra* at 5. Not only does the lien reflect 20 years of marriage to the debtor, it represents her only interest in the marriage's principal asset. In that regard, she resembles a secured creditor far more than anything else:

> The judicial lien creditor can be distinguished from most other secured creditors on purely economic grounds. Most secured creditors acquire their lien as part of a transaction that also provides some economic benefit to the debtor. For example, a purchase-money lender provides funds to the debtor which enable him to buy the collateral in question. . . . Indeed, even the holder of a mechanic's lien has provided a direct benefit to the debtor, i.e., performing repairs or improvements that in most cases increase the value of the property subject to the lien.
>
> The judicial lien creditor, however, does not provide any such reciprocal benefit to the debtor when taking her lien. Instead, the creditor acquires the lien merely for the purpose of invoking the power of the state in the collection of her debt. Although this creditor may indeed have provided a "benefit" to the debtor—that benefit is both indirect and far removed.

Cross, 6 Bankr. Dev. J. at 315 n.32.

In this case, Ms. Farrey's interest in the property did not arise—nor was it obtained—through the judgment. She came into court with a pre-existing ownership interest in the property, and the judge exchanged it and other

assets for a lien that recognized her property interests. In contrast, a potential judicial lien creditor walks into court with no interest in any specific property at all but merely a general unsecured debt. The court then creates a lien to allow the creditor to collect the debt. Here, the state court's purpose was to recognize Ms. Farrey's contribution to the marriage and the value of the couple's assets, including her pre-existing interest in those assets, not to create a new charge against the debtor's property.

While no constitutional issues have been raised in this case, the Court always will attempt to apply a statute in a manner that avoids a constitutional question. "No bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted," this Court has held, "in the absence of an explicit command from Congress." *United States v. Sec. Indus. Bank*, 459 U.S. 70 at 81 (refusing to apply section 522(f)(2) retrospectively, avoiding a Fifth Amendment question).

Jeanne Farrey's rights in the marital estate arose with her marriage, long before the enactment of the Bankruptcy Reform Act of 1978. She has lost all of those property rights, however, through the Seventh Circuit's construction of section 522(f). There is no evidence in the code's text or context that Congress explicitly intended to apply the statute "to property rights established before the enactment date." *Id.* This Court can avoid any "'difficult and sensitive questions arising out of the guarantees of the' Takings Clause" by refusing to permit Gerald Sanderfoot to avoid the lien imposed by the state divorce court. *Id., quoting NLRB v. Catholic Bishop of Chicago*, 440 U.S. 590, 597 (1979).

The *Sanderfoot* decision applies the statute in a way that frustrates both the intent of the federal bankruptcy law and the state divorce laws. Ms. Farrey does not ask this Court to amend the bankruptcy code:

> [She is] not asking [the Court] to disregard the purpose of Congress, but to fulfill it by adhering to the precise contours of the lien-avoidance section. She

> is asking [the Court] not to disregard Congress's words, but to apply them. She is asking not for a complex rule or vague standard but for a straightforward distinction between a judicial lien on the bankrupt's property and a judicial lien intended to secure a spouse's preexisting interest in marital property.

899 F.2d at 607 (Posner, J., dissenting), App. at 20.

B. This Court Should Construe The Statute To Reflect The Intent Of Congress And To Accommodate The States' Paramount Interest In Ensuring Fair And Final Property Divisions In Divorce.

The Seventh Circuit has told Jeanne Farrey that she has to stand in line with Mr. Sanderfoot's other unsecured creditors and leave virtually empty-handed. She has been told that her 20-year contribution to the marriage, recognized by the divorce judgment, is "simply irrelevant" because it was "dissolved" by the bankruptcy code. 899 F.2d at 602, App. at 10a. To reach that erroneous conclusion, the majority ignored not only the statute's history and purpose but the bankruptcy code's vital if delicate relationship with state law. The code does not exist in a vacuum. Indeed, it depends on state law to establish the nature of the property interests affected by the bankruptcy process.

Domestic relations "has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). And so has the need to protect families from financial devastation, in or out of bankruptcy, through state statutory exemptions that shield at least some assets from the claims of creditors.[13] The state homestead exemption invoked by Gerald Sanderfoot was enacted in the first session of the state legislature,

[13] The homestead exemption even would have protected Ms. Farrey's lien interest had it not been avoided. Wis. Stat. § 815.20; *see In re Nabbefeld*, 76 B.R. 132 (Bankr. E.D. Wis. 1987). Ironically, the Seventh Circuit's decision allows Mr. Sanderfoot's homestead exemption, through the bankruptcy code, to extinguish the homestead exemption that would have been available to Ms. Farrey.

Wis. R.S. ch. 102, §§ 51-52, 56, 59 (1849), to provide families "with the right to enjoy the comforts of home life free from claims of creditors." Comment, *Homestead Exemption Interests*, 1981 Wis. L. Rev. 697, 705. In *Warsco v. Oshkosh Sav. and Trust Co.*, 190 Wis. 87, 208 N.W. 886 (1926), the Wisconsin Supreme Court described the public policy underlying the exemption statute:

> [I]t is proper [that each citizen] should have a home where his family may be sheltered, and live beyond the reach of financial misfortune and the demands of creditors. . . . [The exemption] is intended to secure to the householder a home for himself and his family. . . . Such protection extends not only to the owner of the homestead, but to his wife and family and it shelters them in the event of financial embarrassment.

Id. at 93; *see also Schwitzke v. American Nat'l Bank*, 242 Wis. 521, 526-27, 8 N.W.2d 303 (1943). The purpose of the exemption is to protect the debtor *and* his family from creditors, not to provide the debtor with a fail-safe device to deny his family the benefits of their property.

The Seventh Circuit felt itself bound by "the clear legislative judgment that debtors may avoid judicial liens of the type at issue . . . ." 899 F.2d at 605, App. at 16a. The Ninth Circuit in *Pederson* was no less deferential: "We are, of course, without authority to second-guess policy judgments made by the political branches of government." 875 F.2d at 784. Whatever might be said about the "plain language" of section 522(f)(1) and its legislative history, they surely do *not* reflect the kind of explicit policy judgment, "positively required by direct enactment," *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904), necessary to upset the states' interests in protecting the family's homestead and the well-being of the entire family in a divorce.

The law of divorce and the law of bankruptcy already share a complex, symbiotic relationship. State divorce laws seek to divide marital assets to reflect the marital partnership and to protect dependent spouses and children.

Federal bankruptcy law seeks to give a bankrupt debtor a fresh start. Generally, when Congress has enacted legislation that affects the common ground between state and federal law, it has not been subtle. Moreover, it has advanced rather than retarded state interests.

The most obvious example is the bankruptcy law's historical reliance on state exemptions and state property interest definitions. The code even permits the states to eliminate the federal exemptions altogether. 11 U.S.C. § 522(b)(1). In addition, the bankruptcy code attempts to blend state and federal objectives by providing in 11 U.S.C. § 523(a)(5) that the child support, alimony and maintenance obligations of a debtor are not dischargeable. Far from providing support for the Seventh Circuit's decision, however, the dischargeability exemption undercuts it.

Section 727 of the bankruptcy code permits the court to discharge the debtor "from all debts . . ." unless the debtor has destroyed or concealed property, refused to cooperate with the court, committed fraud or come within any of the section's other exceptions. Section 523(a)(5) expressly characterizes as non-dischargeable a debtor's liability for child support, maintenance and alimony. That provision has been part of federal bankruptcy law since at least 1903. 32 Stat. 797, 798 (1903). It leads, inescapably if inferentially, to a series of cases concluding that Congress intended a debtor's liability in a division of marital property to remain dischargeable. *See, e.g., In re Schmiel*, 94 B.R. 373 (Bankr. E.D. Pa. 1988); *In re Hoivik*, 79 B.R. 401 (Bankr. W.D. Wis. 1987).

Yet section 523(a)(5) *does not* reflect a Congressional determination that a judicial lien imposed to guarantee a property division is subject to avoidance automatically under section 522(f)(1). The provisions, and the rationale for them, are not the same. Indeed, they reflect the fundamental distinction long made by this Court and bankruptcy law between a dischargeable debt and a lien that survives bankruptcy. *Supra* at 13. For example, a debtor who owes back payments on a car can have

that debt discharged, but the creditor still can repossess the car because the lien remains.

In *In re Donahue*, 110 B.R. 41 (Bankr. D. Kan. 1990), the bankruptcy court on remand applied this principle after the Tenth Circuit had found the homestead lien unavoidable. *Donahue*, 862 F.2d 259. The value of the homestead at bankruptcy was $80,000 with $44,000 still due on the mortgage, leaving the debtor with $36,000 in equity. His former spouse had a claim against the property for $47,948.13, yet the "debt" was enforceable only to the extent of the equity subject to the lien. The balance was dischargeable as an unsecured claim. *Id.* at 45.

The court arrived at this result by applying the bankruptcy code:

> [A]n allowed claim of a creditor secured by a lien on property in which the estate has an interest, . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. . . .

11 U.S.C. § 506(a); *see* 110 B.R. at 43. Section 522(f) and the dischargeability provision are not contradictory. Section 523(a)(5) addresses the dischargeability of an unsecured property division. Section 522(f) involves another issue entirely—the debtor's ability to avoid a lien.

While a debtor's property division obligation may well be dischargeable, that determination must be made by the court subject to the exceptions of 11 U.S.C. § 727(a). A debtor cannot discharge the debt unilaterally. Under the Seventh Circuit's construction of the lien avoidance statute, by contrast, a judicial lien designed to ensure an "equal" distribution of property can be avoided by the debtor—regardless of fraud or any other objections and subject only to the court's determination that section 522(f)(1) embraces the "judicial lien" at issue.

There is not the slightest evidence that Congress intended, by enacting the lien avoidance statute, to give a secured property division in a divorce even less protection in bankruptcy than an unsecured property division. Yet that is the unavoidable effect of the Seventh Circuit's majority opinion. By allowing the debtor to avoid unilaterally a lien awarded his former wife in their divorce judgment, this decision has upset a balance explicitly struck by Congress and the states—without justification from the facts of the case or the law applied to those facts.

C. The Seventh Circuit's Construction Of The Statute Ignored Its Dire Consequences For The State And Federal Courts.

The final disposition of this case will determine whether Jeanne Farrey ever will receive the equal distribution of property ordered by the state court or whether she will receive virtually nothing. If the Court of Appeals' decision stands, however, it will have a devastating impact on far more than Jeanne Farrey.

In 1988, the state courts of this country granted almost 1.2 million divorces. U.S. Department of Commerce, *Statistical Abstract of the United States* 89 (1990). Although the annual rates of divorce vary, half of all marriages end in divorce. All of these divorces, whether they involve the rich or the poor, inevitably divide the parties' property. For almost 65 percent of the households in this country, that property includes equity in their own home. U.S. Department of Commerce, Current Housing Report H-150-85, American Housing Survey for 1985, p. 1 (1988).

The divorce courts award liens because they are a well-established, practical and effective tool for dividing marital property. Courts use the lien to secure the lienholder's pre-divorce interest until the home eventually can be sold and to carry out an equitable division of assets when the spouse awarded sole title to the homestead does not have enough ready cash to pay the spouse who must

leave it. To the parties and to the state courts mandated by law to make equitable property distributions on divorce, the status of those liens is not an abstract legal question.

A property division theoretically "equal" at the time of the divorce may become grossly inequitable just weeks, or even moments, later if the debtor-spouse can avoid the lien by filing for bankruptcy. That is precisely what has happened to Jeanne Farrey as a result of the majority decision, and it is not an isolated occurrence. *See* Appendix. Without the ability to award a non-avoidable lien, divorce courts now will have few practical alternatives for ensuring that a marital estate will be distributed equitably.

A state court could order the homestead immediately sold with the proceeds divided appropriately. Yet that would result, needlessly in many cases, in forcing children from their family home—regardless of the family's financial status or which parent has custody. It would destroy, moreover, the very rationale for a homestead exemption. *See supra* at 32-33. In theory, a court alternatively could order the title to the homestead held jointly by both spouses, but that would deprive the spouse who left the homestead of the liquid assets necessary to establish a new home. It also would leave the home's maintenance and control divided between two people who had terminated their partnership.

Finally, a divorce court could order the debtor-spouse to execute a mortgage but, as the Seventh Circuit's majority itself recognized, that probably would not meet the bankruptcy code's definition in 11 U.S.C. § 101(45) of a "security interest." 899 F.2d at 604 n.17, App. at 14a n.17. The lien would remain avoidable. *Id.* at 15a. If, on the other hand, the "harsh" result in this case could be avoided simply by a court ordering a party to execute a mortgage, rather than imposing a judicial lien, then form would triumph over substance for no purpose under either state or federal law.

The Seventh Circuit's majority expressed its concern about the "havoc" that would ensue if state divorce law were permitted to vary federal bankruptcy law. 899 F.2d at 605, App. at 15a. While federalism always has that potential, the risk of havoc runs the other way in this case. The bankruptcy code already may have become a standard business planning device. *See id.* at 606 (Posner, J., dissenting), App. at 18a. Absent a clear Congressional mandate, however, it should not also become an integral part of the divorce law of the 50 states. The state court systems already provide for appellate review of domestic relations cases. Under the Seventh Circuit's majority decision, there will be another avenue of "appeal" and another forum for relief—the federal courts.[14]

Statutory construction can occur in neither a substantive nor a practical vacuum. Under the construction at issue here, disgruntled litigants can turn to the bankruptcy code and the federal courts to defy state divorce law, threatening the financial well-being of every spouse awarded a lien by a divorce court to secure his or her share of the marital estate and threatening the integrity of the court system itself. To nullify a divorce judgment and to escape financial responsibility, the party awarded the family homestead need only file a petition for bankruptcy to avoid, unilaterally and automatically, the homestead lien awarded to the party's spouse in the same judgment. Congress could not have intended that result, with its staggering implications for the state and federal courts, and the Seventh Circuit's majority did not consider those implications when it permitted Gerald Sanderfoot to avoid the homestead lien awarded his wife on their divorce.

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[14] The number of personal bankruptcy filings has risen 14 percent in the last year. The current fiscal year budget for the federal courts now exceeds $2 billion—"fueled by drug cases and an ever-rising tide of personal bankruptcies . . . ." Report of the Chief Justice, Dec. 31, 1990.

CONCLUSION

The bankruptcy code protects the interests of debtors without depriving creditors of their security. The homestead exemption protects a family's home. Ironically, Gerald Sanderfoot used the bankruptcy code and, through it, the state's homestead exemption to eliminate Jeanne Farrey's secured interest in the family home. The Seventh Circuit's majority has interpreted the code in a way that Congress never intended and the states never expected: as a "tool by which bounders defraud their spouses." 899 F.2d at 607 (Posner, J., dissenting), App. at 20a. Mr. Sanderfoot has been allowed the fresh start intended by the bankruptcy code not only with his own property intact but with Ms. Farrey's property as well.

The decision of the U.S. Court of Appeals for the Seventh Circuit was wrong. This Court should reverse that judgment and the judgment of the U.S. District Court for the Eastern District of Wisconsin. It should leave intact the bankruptcy court's judgment and, with it, the lien granted Jeanne Farrey against her family's homestead property—her only tangible asset from 20 years of marriage.

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APPENDIX

APPENDIX

-REFUSING TO AVOID THE LIEN:

In re Borman, 886 F.2d 273 (10th Cir. 1989) (equitable lien imposed where homestead property intended to be source from which husband's divorce decree debt would be paid to wife; permitting debtor to discharge debt would result in unjust enrichment), *rev'g*, unpublished opinion of U.S. District Court for the District of Kansas, *aff'g*, U.S. Bankruptcy Court for the District of Kansas.

In re Donahue, 862 F.2d 25^ (10th Cir. 1988) (divorce decree, which awarded debtor's former spouse a money judgment and awarded debtor real property subject to the judgment, an equitable lien or mortgage in former spouse's favor), *rev'g*, 62 B.R. 607 (D. Kan. 1986).

Boyd v. Robinson, 741 F.2d 1112 (8th Cir. 1984) (former husband's lien acquired during marriage dissolution proceeding on parties' homestead not a lien attaching to "an interest of the debtor in property"), *aff'g*, 31 B.R. 591 (D. Minn. 1983), *rev'g*, 26 B.R. 772 (Bankr. D. Minn. 1982).

In re Rittenhouse, 103 B.R. 250 (D. Kan. 1989) (lien divorce court granted debtor's former spouse at same time it awarded spouse's one-half interest in property to debtor not avoidable as judicial lien because it did not attach to debtor's interest in property).

Zachary v. Zachary, 99 B.R. 916 (S.D. Ind. 1989) (lien granted debtor's former wife in divorce decree not avoidable because it merely transformed wife's interest from owner of one-half interest to that of lien holder).

In re Stone, 119 B.R. 222 (Bankr. E.D. Wash. 1990) (liens granted in divorce decrees equivalent to vendor's liens against which Washington homestead exemption not available; *In re Pederson*, 875 F.2d 781 (9th Cir. 1989), criticized for disposing of the "pre-existing interest" ar-

gument even though wife did not have an interest in the property prior to time lien granted).

In the matter of Holtzhauser, 117 B.R. 519 (Bankr. D. Neb. 1990) (lien of former spouse on debtor's residence under divorce decree not avoidable under *Boyd v. Robinson*, 741 F.2d 1112).

In re McCormmach, 111 B.R. 330 (Bankr. D. Or. 1990) (mortgage executed by debtor pursuant to terms of stipulated dissolution decree not avoidable as judicial lien impairing debtor's homestead exemption).

In re Worth, 100 B.R. 834 (Bankr. N.D. Tex. 1989) (lien from divorce court to debtor's former spouse, awarded at same time debtor received one-half interest in homestead, not impairing any exemptions to which debtor entitled under Texas law).

In re Dunn, 109 B.R. 865 (Bankr. N.D. Ind. 1988) (lien granted by debtor to former spouse in property agreement incorporated into divorce decree more a "consensual lien" than a "judicial lien" and, therefore, not avoidable).

In re Conway, 93 B.R. 731 (Bankr. N.D. Okla. 1988) (lien on homestead property granted debtor's spouse by divorce decree not a judgment lien avoidable by debtor because lien in existence when debtor received title to property).

In re Boyd, 93 B.R. 538 (Bankr. S.D. Tex. 1988) (lien awarded in a divorce decree an implied but valid vendor's lien on homestead).

In re Warren, 91 B.R. 930 (Bankr. D. Or. 1988) (lien given husband in marital home on divorce not a judicial lien avoidable by former wife, following logic of *Boyd v. Robinson*, 741 F.2d 1112).

In re Shands, 57 B.R. 49 (Bankr. D. S.C. 1985) (former wife's lien on debtor's residence, imposed pursuant to property settlement agreement incorporated into divorce decree, a security interest not a judicial lien and not avoidable).

In re Hart, 50 B.R. 956 (Bankr. D. Nev. 1985) (holding an equitable lien, created by quit claim transfer of former husband's interest to debtor pursuant to divorce decree to secure payment of husband's equity interest in home, a purchase money obligation rather than judicial lien and not avoidable).

In re Chesnut, 50 B.R. 309 (Bankr. W.D. Okla. 1985) (lien to former spouse represents a division of family property, and property's conveyance subject to the lien to secure payment of other spouse's share of the property settlement not subject to section 522(f)).

In re Butts, 46 B.R. 292 (Bankr. D. N.D. 1985) (constructive trust imposed where wife conveyed interest in marital home during divorce wth expectation of receiving in exchange $35,000 and husband filed bankruptcy claiming entire homestead as exempt intending to take entire proceeds of home sale).

In re Seablom, 45 B.R. 445 (Bankr. D. N.D. 1984) (holding a lien created by divorce decree to protect former wife's compensation for her interest in jointly-owned realty did not attach to an interest of the estate but protected a pre-existing property interest).

In re Williams, 38 B.R. 224 (Bankr. N.D. Okla. 1984) (finding that divorced wife's judicial lien on husband's property, imposed to secure lump-sum property settlement awarded to wife, arose contemporaneously with conveyance of property to husband and judicial lien could not be avoided).

In re Thomas, 32 B.R. 11 (Bankr. D. Or. 1983) (document that conveys one spouse's homestead interest to other spouse simultaneously creates a lien in favor of spouse who leaves residence; property conveyed subject

to lien that never fixed on an interest of debtor in the property).

In re Graham, 28 B.R. 928 (Bankr. N.D. Iowa 1983) (lien on debtor's homestead property held by debtor's former wife not avoidable because it created constructive trust for wife to the extent of assets used in purchasing homestead).

In re Adams, 29 B.R. 452 (Bankr. N.D. Iowa 1982) (holding that judicial lien granted pursuant to divorce decree renders otherwise exempt homestead property not exempt to the value of the lien under Iowa law).

Wicks v. Wicks, 26 B.R. 769 (Bankr. D. Minn. 1982) (finding former husband's lien against debtor's homestead, which arose from stipulated agreement incorporated into divorce judgment, a security interest that could not be avoided).

In re Erwin, 25 B.R. 363 (Bankr. D. Minn. 1982) (holding that decree conveyed former spouse's interest to debtor subject to lien and constitutes an equitable mortgage entitled to same treatment as purchase money mortgage).

Matter of Bailey, 20 B.R. 906 (Bankr. W.D. Wis. 1982) (holding that divorce judgment creates an equitable lien on debtor's homestead, not avoidable under section 522(f)).

In re Scott, 12 B.R. 613 (Bankr. W.D. Okla. 1981) (lien not fixed on an interest of debtor in the property where lien created by same document that conveyed interest in the homestead property to spouse).

AVOIDING THE LIEN:

In re Sanderfoot, 899 F.2d 598 (7th Cir. 1990) (former spouse's lien on marital home, granted pursuant to divorce decree, avoidable as impairing debtor's homestead exemption), *aff'g*, 92 B.R. 802 (E.D. Wis. 1988), *rev'g*, 83 B.R. 564 (Bankr. E.D Wis. 1988).

In re Pederson, 875 F.2d 781 (9th Cir. 1989) (lien granted debtor's former wife in divorce action a judicial lien subject to avoidance), *aff'g*, 78 B.R. 264 (Bankr. 9th Cir. 1987), *rev'g*, No. 86-05147-Y7 (Bankr. W.D. Wash. Sept. 25, 1986).

Maus v. Maus, 837 F.2d 935 (10th Cir. 1988) (lien created by divorce decree an avoidable judicial lien if property settlement agreement incorporated in divorce specifically made grant of homestead property free and clear of claims of husband), *aff'g*, unpublished opinion of U.S. District Court for District of Kansas, *rev'g*, 48 B.R. 948 (Bankr. D. Kan. 1985).

In re Stebbins by and through Dahl, 105 B.R. 118 (S.D. Fla. 1989) (lien on exempt property that represents nondischargeable judgment for alimony, support or maintenance not avoidable but judgment of property settlement avoidable).

In re Duncan, 85 B.R. 80 (W.D. Wis. 1988) (judicial lien granted on exempt property in divorce judgment to secure payment of property settlement avoidable).

In re Godfrey, 102 B.R. 769 (Bankr. 9th Cir. 1989) (lien arising from divorce decree avoidable as judicial lien under *In re Pederson*, 875 F.2d 781).

In re Brewer, 117 B.R. 712 (Bankr. M.D. Fla. 1990) (lien in favor of debtor's former spouse created by entry of judgment a judicial lien subject to avoidance to extent lien impaired homestead exemption).

In re Showinsky, 117 B.R. 284 (Bankr. W.D. Mich. 1990) (lien granted debtor's ex-wife in marital home a judicial lien notwithstanding uncontested divorce that merely incorporated terms of the settlement between the parties).

In re Porter, 112 B.R. 979 (Bankr. D. Mo. 1990) (lien arising from divorce judgment a judicial lien impairing debtor's homestead exemption and avoidable).

In re Boggess, 105 B.R. 470 (Bankr. S.D. Ill. 1989) (former spouse's lien awarded in divorce decree against homestead a judicial lien avoidable under section 522(f)(1)).

In re Brothers, 100 B.R. 565 (Bankr. N.D. Ala. 1989) (former spouse's lien on homestead, awarded pursuant to divorce decree, a judicial lien subject to avoidance).

In re Alvarado, 92 B.R. 923 (Bankr. D. Kan. 1988) (judicial lien on debtor's homestead, granted by divorce decree, attached to debtor's interest in property rather than to pre-existing interest of former spouse and therefore avoidable, a decision required by *Maus v. Maus*, 837 F.2d 935).

In re Coffman, 52 B.R. 667 (Bankr. D. Md. 1985) (lien granted debtor's husband pursuant to divorce decree avoidable because it was for dischargeable property division).

In re Grimes, 46 B.R. 84 (Bankr. D. Md. 1985) (lien securing debt in nature of property settlement, rather than alimony, maintenance or support avoidable).

Matter of Maness, 17 B.R. 76 (Bankr. W.D. Mo. 1981) (judicial lien held by debtor's former wife arising out of dissolution decree avoidable if debtor complied with dissolution decree including payment of one-half of equity in the property).